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No. 83-1188

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH T. SMITH,

Petitioner

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
PENNSYLVANIA

BRIEF OF RESPONDENT, PENNSYLVANIA BOARD OF LAW EXAMINERS

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COUNTER-STATEMENT OF MATERIAL FACTS

The Petitioner received a failing score on the July 1982 Pennsylvania Bar Examination. Petitioner achieved a Multistate Bar Examination ("MBE") scaled and rounded-off score of 125 and a converted essay score of 132.893 for a combined score of 128.95. Claiming that the method of producing these scores wrongly deprived him of a passing grade, Petitioner sought review by the Pennsylvania Supreme Court. On May 27, 1983, Petitioner's Application for Admission to the Bar was denied in an Order signed by the Honorable Samuel J. Roberts,

then Chief Justice of the Supreme Court of Pennsylvania. Petitioner then filed a Petition for Reconsideration, which was denied by the Pennsylvania Supreme Court on August 15, 1983. Petitioner now seeks review by this Honorable Court.

Essentially, Petitioner's claim is that the method by which applicants' scores are computed by the Pennsylvania Board of Law Examiners ("Board") is violative of his rights to due process and to equal protection of the law. The gravamen of Petitioner's complaint is that either his essay score should have been rounded off to a three-digit whole number before averaging it with the MBE score or the MBE score should not have been rounded off before averaging it with the essay score. In either case, Petitioner asserts, he would have received a passing grade.

An examinee may pass the Pennsylvania Bar Examination in one of two ways: Any examinee who achieves an MBE-scaled score of 135 or higher automatically passes and his or her essay papers are not read. If an applicant does not achieve a 135 score, his or her essay papers are graded and if he or she obtains a combined score of 129, the examinee passes.

The scores are computed in the following manner: The MBE score is scaled and converted to a three-digit whole number by the National Conference of Bar Examiners through the Education Testing Service ("ETS"). To arrive at this figure, ETS first adds up the number of correct answers in each MBE section and then converts this raw score to a scaled score. The scaled score is the raw score adjusted upward to compensate for the degree of difficulty of the particular examination and to standardize the scoring. ETS then rounds the scaled score off so that the MBE scores received by the Board are all three-digit whole numbers.

The Pennsylvania Board of Law Examiners determines the essay score by averaging the two-digit per-

centage scores achieved on each of eight essay questions. This figure is then rounded off to the tenth decimal place and placed on a multistate scale to achieve a three-digit whole number carried to the thousandth decimal place.

This number is then averaged with the three-digit MBE score to produce a combined score expressed as a three-digit whole number rounded off to the hundredth decimal place.

ARGUMENT

I. Petitioner Has Suffered No Violation of Due Process or Equal Protection by the Board's Method of Calculating Examination Scores

It has long been stated that the admission to practice law in a state and before its courts is primarily a matter of state concern. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Accordingly, a federal court cannot interfere with a state's determination absent a showing that an applicant has been denied admission for constitutionally impermissible reasons. *Id.* at 238-40, 77 S.Ct. at 752. States can require high standards of qualification before admitting an applicant to the Bar so long as each qualification has a rational connection with the applicant's fitness to practice law. *Id.; cf. Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

In the case *sub judice*, Petitioner challenges not the Bar Examination itself, but the method by which examination scores are computed. First, Petitioner claims that he suffered a consitutional deprivation because the MBE scores were rounded off to a three-digit whole number. Petitioner has offered no support for his claim that he was entitled not to have the MBE score rounded off; nor could he find such support. It is of no constitutional dimension whether Petitioner is correct or not in stating that the rounding off of this score is not the most accurate means of determining who is most qualified to practice law. The question is not whether one grading procedure is the most effective way of evaluating an applicant's fitness, but whether it is not so arbitrary as to constitute a violation of due process. *Thompson v. Schmidt*, 601 F.2d 305 (7th Cir. 1979).

The grading procedure about which Petitioner complains is clearly not so arbitrary. Petitioner states that it is Respondent who rounds off the MBE score; this is simply not the case. The MBE score is scaled and

rounded off by ETS, which sends Respondent printouts of the applicants' raw and scaled scores all in three-digit whole numbers. Furthermore, that the Board plays no role in the MBE's preparation, grading, or calculation of a final score is neither arbitrary nor unconstitutional. *Cf. Pettit v. Gingerich*, 427 F.Supp. 282 (D. Md. 1977).

Petitioner also claims that the Board should have rounded off the essay score before averaging it with the MBE score. Again, Petitioner has not offered nor could he find any support for his claim that the Board should have rounded off the essay score. Furthermore, as stated above, even if the grading procedure chosen by the Board is not the best one from Petitioner's point of view, no deprivation of constitutional dimension has occurred absent a showing that the procedure is so arbitrary as to deprive the applicant of due process. *Thompson, supra.*

In addition, Petitioner claims that the calculation methods of the Board "invidiously discriminate" against him. Petitioner does not maintain that the Board adopted a particular method of calculating scores so that he personally would fail the examination, but only that the chosen method results in applicants with his scores failing while others pass. As Petitioner concedes, however, if the Board had calculated scores as he desires, some of those who had passed the examination would have failed while he would have passed. Indeed, any failing applicant could devise a scoring scheme which would permit him or her to pass.

For the Board's scheme to pass constitutional muster, all that is required is that it not be arbitrary. Certainly, it is at least as rational for the Board not to round off the essay scores — that is, to draw a precise line and not to waver from it — as it would be to push some applicants' scores up and some down.

Petitioner also claims that the Board's stated policy was "to convert the essay average to a three digit number" before averaging it with the MBE score (see Appen-

dix III to Petitioner's Petition), and that the Board's failure to abide by this policy violated his constitutional rights. It is difficult to understand how Petitioner was, as he claims, coerced and placed in duress by the issuance of that statement. Certainly, Petitioner cannot maintain that he purposely achieved his particular score in reliance on this statement. In any event, the statement quoted by Petitioner does not set forth the Board's grading procedures, but was designed to express in general terms how an examinee's score was determined. The statement has since been changed to read, "The essay average is placed on the MBE scale, converting it to a three digit whole number carried to the thousandth decimal place."

Moreover, even if the statement did inartfully or ambiguously describe the Board's policy of converting a percentage score to a score compatible for averaging with the three-digit MBE score, no constitutional violation has occurred. The law is clear that mistakes by the state or its officers — as opposed to intentional deprivations — do not rise to the level of constitutional violations. *Crocker v. Hakes*, 616 F.2d 237 (5th Cir. 1980); *Marchant v. City of Little Rock*, 557 F.Supp. 475 (E.D. Ark. 1983).

Finally, Petitioner claims he was denied due process by the Board's refusal to provide him with a detailed explanation of the statistical testing methods. The only case relied on by Petitioner to support this claim is inapposite to the instant case. While the court in *In Re Peterson*, 459 P.2d 703 (Alas. 1969), did hold that applicants were entitled to certain documents when appealing their failing scores, the court relied on its inherent power to control admission to the state Bar and not on any federal constitutional grounds. For a similar reading of *Peterson*, *see Witheld v. Ill. Bd. of Law Examiners*, 504 F.2d 478 (7th Cir. 1974); *Singleton v. Louisiana State Bar Association*, 413 F.Supp. 1092 (E.D. La.

1976). Further, the court in *Peterson* refused to admit the applicant in that case to the Bar as a result of what it considered unacceptable procedures; instead, the court remanded the case with an order that the applicant be given the requested documents. In the instant case, even if Petitioner were entitled to the documents he requests, it is difficult to see how he was harmed by the Board's refusal to provide them. He appears to have otherwise obtained all the information he requested and its receipt has in no way furnished him with a case of constitutional dimension or a right to be admitted to the Pennsylvania Bar.

CONCLUSION

There being no special and important reasons which imply a reach to a problem beyond the academic or the episodic, and there being no case involving principles the settlement of which is of importance to the public as distinguished from the parties, the Board of Law Examiners respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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